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Paper No. 15

In re Application of  
James G. Retzloff *et al*  
Application No. 09/809,454  
Filed: March 15, 2001  
Attorney Docket No. VIK01 P-331

Director's Office DECISION ON PETITION  
Group 3700

This is a decision on the petition, filed by facsimile transmission on January 20, 2004, by which petitioners request withdrawal of the finality of the examiner's Office action dated October 17, 2003. The petition is considered pursuant to 37 CFR 1.181, and no fee is required. A refund of the \$130.00 petition fee will be credited to Deposit Account No. 22-0190.

The petition is dismissed as being untimely filed.

37 CFR 1.181(f) reads:

"The mere filing of a petition will not stay any period for reply that may be running against the application, nor act as a stay of other proceedings. Any petition under this part not filed within two months of the mailing date of the action or notice from which relief is requested may be dismissed as untimely, except as otherwise provided. This two-month period is not extendable." (Emphasis supplied.)

As the instant petition was filed more than two months after the action from which relief is requested, the petition is untimely filed.

As a courtesy to petitioners, a cursory review of the petition on its merits has been undertaken. That review shows that the petition does not appear to set forth an adequate basis for the relief requested. The MPEP material quoted and relied upon in the petition appears in MPEP § 706.07(b). However, the phrase "would have been properly finally rejected on the grounds and art of record in the next Office action ..." refers to the propriety of the final rejection as a matter of procedure, i.e. as a matter of the procedural practice described in MPEP § 706.07(b). The issue of whether the rejections promulgated by the examiner are legally correct on their merits is irrelevant to the question of whether the examiner's action was properly made final as a matter of procedure. The legal correctness of the rejections in the action is not petitionable, since it is that issue is appealable. See 37 CFR 1.181(a)(1). Petitioner cannot obtain relief on a procedural matter by way of a petition based solely upon resolution of an issue which is appealable and not petitionable. Similarly, the fact that the examiner allowed some claims on the merits is irrelevant to the question of whether it was procedurally proper to close prosecution on the rejection rejected claims by making the action final.

Petitioners are entitled to file a renewed petition, without fee, addressing the matter of timeliness of the filing of the original petition and demonstrating a basis for excusing the late filing of the original petition. If such renewed petition is granted, petitioners will then be entitled to a formal and detailed review of the substance of the original petition. The filing of a renewed petition will not stay any period for reply that may be running against the application or act as a stay of other proceedings. See 37 CFR 1.181(f).

PETITION DISMISSED.

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